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CASE NO. 89-874

IN THE

Supreme Court Of The United States

October Term, 1989

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Petitioner,

v.

PHILLIP J. RUSSELL,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTION PRESENTED FOR REVIEW

WERE THE TRIAL COURT AND SUPREME COURT OF ALABAMA IN ERROR WHEN BOTH FOUND INFERENCES FROM THE EVIDENCE THAT PLAINTIFF SUSTAINED AN IMPAIRMENT TO HIS FUTURE EARNING CAPACITY TO BE WITHIN THE COMMON KNOWLEDGE OF THE JURY?

CERTIFICATE OF INTERESTED PARTIES

Counsel of record for Plaintiff-Respondent, Phillip J. Russell, in accordance with Rule 28.1 of the Rules of the Supreme Court of the United States, certify that the following listed parties have an interest in the outcome of this case:

1. Phillip J. Russell, Plaintiff-Respondent;
2. Illinois Central Gulf Railroad Company, Defendant-Petitioner;
3. IC Industries, Incorporated.

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STATUTORY PROVISIONS

SECTION 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be

liable in damages to any person suffering injury while he is employed by such carrier in such commerce or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee and, if none, then of such employee's parents; and if none, then the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

STATEMENT OF THE CASE

The "Statement of the Case" contained in the Railroad's Petition for Certiorari is incomplete, acerb, and opinionated. A proper statement is found in the written opinion of the Supreme Court of Alabama:

> Russell was employed by I.C.G. as a brakeman. In February 1985, Russell injured his back when he slipped and fell on an icy walkway as he was walking from the train to the yard office. Russell was treated at a local hospital and released a few hours later. Over the next six weeks, he received conservative treatment from his family physician for what was thought to be a bruised or strained hip. He was off work for two months. Russell returned to work, but continued to have problems with his lower back. He received treatment periodically from his family

physician and an orthopedist. In September 1985, he went on "light duty" and later saw another orthopedic surgeon for a second opinion regarding back surgery. In October 1985, he underwent surgery for a herniated disk in his lower back, at the L-5, S-1 level. Russell did not return to work as a brakeman until January 1987. The orthopedic surgeon gave him an anatomical disability rating of 12% to the body as a whole. After returning to work, and up to the trial in March 1988, he worked six or seven days a week. He was able to perform his duties as a brakeman, but complained about pain. Russell took non-prescription medicine for pain while on the job and wore a transcutaneous nerve stimulator (TENS) unit on his back. His regular duties as a brakeman included a significant amount of physical activity. The jolting, bouncing, and vibration incurred while riding the train aggravated his back pain. He had a life expectancy of 31.8 years and a work life expectancy of 18.13 years. Russell earned $41,734.00 in 1987, which was $3,448.00 more than he had earned in 1984, the last full year he worked before the injury. He was still employed full-time by I.C.G. at the time of the trial.

At trial, the jury heard the deposition testimony of Russell's family physician concerning his treatment of Russell's back injury. He treated Russell for pain in his lower back and prescribed pain medication. The family physician's testimony established that Russell had a serious back problem that needed the attention of an orthopedist. He sent Russell to see two orthopedic surgeons, both of whom later recommended that he undergo back surgery for a herinated disk. He allowed Russell to return to work on light duty, which meant he could do no bending or heavy lifting.

The first orthopedic surgeon testified that he examined Russell and found that he had only 30% of normal forward flexibility; very little lateral

bending and rotational twist in the lower back; acute tenderness and pain in the lower back; and muscle spasms. He treated Russell conservatively and prescribed pain medication; a muscle relaxant; anti-inflammatory medication; and a lumbar corset. He allowed Russell to return to work, but told him to avoid lifting and bending. Russell still complained of pain in his lower back and extending down his right leg. Russell had X-rays and a CAT scan, from which the surgeon determined that Russell had a herinated disk, and he recommended that Russell undergo surgery.

Russell went to another orthopedic surgeon for a second opinion.

The jury heard the deposition testimony of the second orthopedic surgeon concerning Russell's back condition. His testimony was that he examined Russell in September 1985 and found that he had 60% of the normal range of motion in the lower back; normal muscle and reflexes; decreased sensation on the top of his left foot; and disk narrowing at the L-5, S-1 level. Russell also had another CAT scan, which showed a herinated disk at the L-5, S-1 level. In October 1985, Russell underwent back surgery. Over the next few months following surgery, the surgeon examined Russell and determined that his pain was relieved but that he was still having problems, which the surgeon said were consistent with arthritis. Becasue of the continuing problems with his back, Russell was given another CAT scan and a myelogram; the results showed that he had no other herinated disk. He gave Russell a 12% anatomical disability rating. Several months later, Russell still complained of back problems and had another CAT scan and a myelogram; the results indicated that he had a "prominent bulging of L-4, 5, and again at L-5, S-1, leaning slightly toward the right," and disk narrowing with "some degenerative changes." Three months after Russell

went back to work full-time, he fit Russell with another corset and prescribed an arthritis medication. He testified that Russell could engage in normal work activities without any restrictions.

Russell went to see a neurosurgeon for further treatment upon the recommendation of the second orthopedic surgeon.

The neurosurgeon testified that Russell complained to him about back pain. He examined him and stated that, from a neurological standpoint, Russell was not disabled to do any type of work and could do anything he felt capable of doing. He testified that anyone who has been operated on has a tendency and chance to rerupture another disk, either at the same level or the one above or below. He said that it was also possible that after surgery that a herinated disk might recur with no trauma if the patient has a degenerative condition. He prescribed for Russell special exercises (the "Williams flexion exercise") to build up the muscle in his back to relieve the pain.

Russell testified that he had constant problems performing the duties of a railroad brakeman. He said that he has pain when picking up anything heavy; coupling hoses; setting handbrakes; riding in the train; or sitting or standing for long periods of time. He said that, when he has the chance, he lies down while at work to relieve the pain.

Russell called an economist as an expert witness. He stated that Russell's net loss of income from February 1985 to January 1987 was $50,397, after taxes and expenses. In calculating the amount of money that Russell will earn in the future (working full-time) he considered the amount of his annualized gross wages; his work life expectancy based on U.S. Department of Labor tables (18.3 years); a 2% real wage gain (the amount of wages exceeding inflation, using the consumer price index); and

income taxes paid on future wages. The present value of Russell's future earnings was said to be $716,200; one percent would be $7162; five percent would be $35,810; ten percent would be $71,610.

In closing arguments, Russell's lawyers essentially argued for an award for loss of future earnings in the same percentage (12%) as Russell's anatomical disability rating and asked for $85,944 in damages for loss of future earnings. He also asked the jury for an award of $344,000 for pain and suffering during Russell's life expectancy of 31.8 years.

The jury returned a verdict in favor of Russell in the amount of $325,000. I.C.G. appealed.

Pages A-2 through A-9, Railroad's Petition to this Court.

REASONS FOR DENYING THE WRIT

The law of damages for impairment of future earning capacity in Federal Employers' Liability Act (F.E.L.A.) cases, as well as in other cases, is generally stated in *American Jurisprudence* as follows:

> On the question of impairment of earnings, it is *generally held* that expert medical testimony is not necessary to establish future loss of earning power. Other cases, however, require expert testimony to corroborate claims for loss of future earning capacity.
>
> *Where the injury is obscure,* damages for impairment of capacity to work must be supported by expert medical proof, which must show more than a mere possibility of such damages.

22 Am Jur 2d Section 969, p. 1008. (Emphasis supplied)

As the Supreme Court of Alabama stated in its opinion, the jury's finding an impairment to some degree in Mr. P. J. Russell's future earning capacity was supported not only by his own testimony as to his symptoms, his work-required physical demands and activities, his wearing a TEN's unit

while working, and his wearing a back brace while working, but by the testimony of Mr. Russell's family physician, a neurosurgeon, and two orthopedic surgeons. One of the two orthopedic surgeons operated on his lumbar back and prescribed a change in back braces to relieve pain well after Mr. Russell had returned to work for the railroad. This doctor also continued prescribing pain medication long after Mr. Russell's return to work. These orthopedic surgeons also diagnosed lumbar spine arthritis as a result of Mr. Russell's injury and described post operative tilting of his spine as well as "prominent bulging" of the disc above the level on which surgery was performed. These conditons were described as painful and existing permanently in Mr. Russell's back. The neurosurgeon testified that Mr. Russell had a tendency to rerupture a disc due to his injury and surgery, either at the same level or the level above or below.

In the face of this formidable medical evidence elicited from treating physicians and medical tests, the railroad offered no medical evidence. Nothing! The treating physician opined a 12% permanent anatomical disability to Mr. Russell's body as a whole. His opinion was not challenged by any railroad evidence nor was there any conflicting testimony in the mass of medical proof presented by the plaintiff.

It is clear that the trial jury's award of damages for an impairment of future earning capacity was supported by direct medical evidence of such. In addition, as was pointed out by the Supreme Court of Alabama, the jury had bountiful evidence from which proper inferences of earning impairment could be drawn.

The railroad cites *Parra v. Atchison, Topeka & Santa Fe Railway Co.*, 787 F.2d 507 (10th Cir. 1986), as if *Parra* is in conflict with the opinion of the Supreme Court of Alabama. Both are consistent one with the other, distinguishable in their result only by the weight of the medical evidence in each case. In the case at bar, the medical evidence was sufficient, if not overwhelming, that plaintiff sustained an impaired earning capacity, albeit the jury had evidence of substantial earnings since Mr. Russell returned to work. It

was *L&N v. Steel*, 257 Ala. 474, 57 So.2d 664 (1952), where the Alabama Supreme Court said lost wages and impaired earning capacity were two separate entities:

> Furthermore, the plaintiff is not precluded from recovery for impairment of his earning power by reason of injuries sustained by him because he returned to work in October 1949 and worked up until the time of trial in December 1950. It is held that wages actually earned by a person and his earning power are not identical. The fact that the plaintiff worked for appellant for several months prior to the trial of the case was merely evidence to be considered by the jury in determining whether or not his earning power had been impaired by the accident.

Id., at page 481.

In *Parra*, there was substantial medical evidence; evidence that Mr. Parra was not medically qualified to do the job he was performing *even before his injury and resulting surgery.* He was better off medically after his injury and surgery than he had been before! There was no direct medical evidence in *Parra* of impaired earning capacity. There was no evidence from which a jury could draw any inference of impaired earning capacity. In fact, the evidence was that Mr. Parra was better than ever:

> An examination of the plaintiff's own expert medical testimony here would refute his claim for loss of future earnings. The only expert medical testimony presented by the plaintiff was that of his own physician Dr. O. C. Mitchell. The evidence of Dr. Mitchell's testimony was that Mr. Parra suffered from a congential back disorder which made him more susceptible to lower back injury. Dr. Mitchell's testimony also was that Mr. Parra's unstable back would have disqualified him from work as a heavy laborer had it been detected [before the injury for which he brought suit]. As we earlier stated, expert medical testimony is necessary to establish that a loss

> of future earnings capacity was caused by such a *non-obvious* injury; plaintiff's expert testimony refutes the causal connection between his injury and his diminished capacity for heavy labor. In light of Dr. Mitchell's further opinion after Mr. Parra's back was more stable after surgery than prior to his accident, it seems improper for plaintiff to be compensated for future wages from heavy labor for which his pre-existing congential back disorder had already disqualified him. (Emphasis supplied)

Id. at page 509.

In *DeCluco v. Metro-North Commuter Railroad*, 758 F.2d 856 (2d Cir. 1985), the plaintiff no longer was employed by the railroad in the same capacity as at the time of his injury. He had been promoted to Shop Superintendent, able to exercise his seniority rights as Shop Foreman and Supervisor should he ever be removed as Shop Superintendent.

Dixon v. Pennsylvania Railroad Co., 378 F.2d 392 (10th Cir. 1967), is a bad interpretation of Federal Employers' Liability Act law. When a Court says, as the *Dixon* Court said, that the jury "could not rationally have found it more probable than not that the appellant's climbing ability was substantially impaired" it was referring to a jury that *Bailey v. Central Vermont Railroad*, 319 U.S. 350, 353, 354, 53 S.Ct. 1062, 87 L.Ed. 1444, 1447, 1448 (1942), put in the box in FELA cases. The two cases which have subsequently cited *Dixon* have both reversed trial courts' refusal to allow damages for impaired earning power. One distinguished *Dixon*, *Wagner v. Reading Co.*, 428 F.2d 289, 291 (1970). The other cited *Dixon* in a dissenting opinion on the burden of proof, *Fleming v. American Exporting Lines*, 451 F.2d 1329, 1333 Footnote 1 (1971). However, *Dixon* did allow damages for permanent "disability" but distinguished those damages from any damages for permanent impairment of earning capacity. *Dixon* at page 294.

The defendant's interpretation of *Roderick v. St. Louis Southwestern Railway Co.*, 299 S.W.2d 422, 428, 429 (Mo. 1957), (Op. B. 13, 14), is strained. The Court said:

[As to a previous opinion of that Court] Nowhere in the opinion does the Court *say or even intimate that a sensitivity to chrome, acquired through negligence of an employer, such as will impair an employee's earning capacity, does not constitute an injury for which he may recover damages. The opinion holds directly to the contrary.* It further holds that the evidence shows the injury resulting in sensitivity is permanent but does not show that the dermatitis is necessarily permanent. Obviously, it was correct in so holding.

In the instant case, several things are made clear by plaintiff's evidence:

(1) At trial time, plaintiff was and had been for more than two years afflicted with a recurring dermatitis, which may or may not clear up if he stays completely away from chromates;

(2) He has developed a permanent sensitivity to chromates, which renders him permanently unfit for employment where he may come into contact with them;

(3) He has and for an indefinite time in the future will have a polysensitivity to such things as oils, greases, solvents, etc., thereby *impairing his ability to earn money for an indefinite period of time*; and

(4) There is no evidence that the polysensitivity is permanent.

We hold that there was evidence justifying the submission of an award of damages for *a distinctive permanent injury sustained by plaintiff*, to-wit: An acquired sensitivity to chromates that would cause a recurrence of dermatitis if he should come into contact with them, *thereby reducing or impairing his earning capacity pro tanto.* (Emphasis supplied)

* * *

In view of our conclusion that there was substantial evidence of permanent impairment of plaintiff's earning capacity, it follows as a matter of course that the trial court erred in refusing plaintiff's proffer of the mortality tables . . . (Emphasis supplied)

Id. at pages 428, 429.

Honeycutt v. Wabash Railroad Co., 313 S.W.2d 214, 216 (1958), is hardly applicable to Mr. Russell's case even though it, too, is referred to in the railroad's brief. (Op. B. 13). Mr. Russell had surgery and was left with a deformed, tilted, scarred, narrowed and arthritic lumbosacral joint in his back. He lost seventeen and half months work amounting to net after-tax earnings of $50,397.00. Mr. Russell returned to work in spite of his treating surgeon's reservations and opinion to the contrary. Mr. Russell was slower and did not "get around" as well on his job as he did before his injury and surgery. Conversely, in *Honeycutt*, Mr. Honeycutt "lost the balance of the day of his injury and two days for a trip to Decatur, Illinois, for a medical examination." It was pointed out in that opinion that the plaintiff's lawyer in *Honeycutt* offered no evidence of the plaintiff's earnings prior to his injury and offered no evidence of plaintiff's life expectancy so as to support a claim for future lost earning capacity.

The Alabama Supreme Court has not ignored decisions of the federal appellate courts, as stated in the railroad's accusative "Question Presented for Review." It followed the general law as to proof of earning capacity impairment as did the trial court:

> Although loss of future earning capacity does not necessarily follow from a permanent injury alone, here the partial loss of that capacity is fairly and *reasonably inferable* from the nature and extent of the injury and the type activities engaged in by plaintiff at his work. The evidence and circumstances here adduced at trial rendered the jury capable, if not just as capable as an expert, to correlate the injury with the lost earning capacity. See *Carnival Cruise Lines, Inc. v. Snoddy*, 457 So.2d 379 (Ala. 1984). (Emphasis supplied)

Opinion of Trial Judge, Page A-18, A-19, Railroad's Petition to this Court.

In addition, the trial court and Supreme Court of Alabama followed the mandate of *Bailey*, supra, p. 9, and *Rogers v.*

Missouri Pacific Railroad, 352 U.S. 500, 506-507, 77 S.Ct. 443, 448-449, 1 L.Ed.2d 493, 499, 500 (1957), that a jury determination has a special place in FELA cases:

> It [the jury's province] is *part and parcel of the remedy* afforded railroad workers under the Employers' Liability Act. (Emphasis supplied)
>
> * * *
>
> *To deprive these workers of the benefit of a jury trial in close and doubtful cases is to take away a goodly portion of the relief which Congress has afforded them. Bailey v. Central Vermont Railroad*, 319 U.S. 350, 353, 354, 53 S.Ct. 1062, 87 L.Ed. 1444, 1447, 1448 (1942).

As stated by Mr. Justice Douglas in a scholarly concurring opinion in *Wilkerson v. McCarthy*, 336 U.S. 53, 68, 93 L.Ed. 497, 509:

> The Federal Employers' Liability Act was designed to put on the railroad industry some of the costs for the legs, eyes, arms, and lives which it consumed in its operations.

It is for this reason that the act is to be construed liberally in favor of the employee. That is not to say that plaintiff in the case at bar needs any liberal construction.

CONCLUSION

Rarely will an appellate court include the plethora of medical proof of impaired earning capacity found in the Supreme Court of Alabama's opinion in the case at bar. In addition, that medical proof is applied to solid F.E.L.A. principles. Couple this with the fact that it deviates not at all with the law of *Parra, DeChico,* and other cases cited by the railroad.

Therefore, ALABAMA is not out of the mainstream of F.E.L.A. damage law but has and will continue to ROLL with the TIDE.

This Petition is inappropriate under the circumstances and should not be granted.

Respectfully submitted,

By: Frank O. Burge

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing have been served upon all parties required to be served: Hobart A. McWhorter, Jr., Esq., Joseph B. Mays, Jr., Esq., and John D. Watson, Esq., Bradley, Arant, Rose & White, 1400 Park Place Tower, Birmingham, Alabama 35203, by forwarding three (3) copies thereof through the United States mail, first-class postage prepaid and properly addressed, on this 4th day of January, 1990.

Frank O. Burge

FRANK O. BURGE, JR.